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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MELVIN K. HOOKS, Defendant and Appellant.	B154475 (Los Angeles County Super. Ct. No. BA 210486)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norm Shapiro, Judge. Affirmed.

Maureen J. Shanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E. Maxwell, Ana R. Duarte and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant appeals from the judgment entered following his jury conviction of second degree robbery and true findings by the court that he had served two prior prison terms and had suffered one prior serious felony conviction. (Pen. Code, §§ 667, subd. (a)(1), 667.5, subd. (b), 667, subds. (b)-(i), 1170.12, subd. (a)-(d).)[1] He raises several contentions based on the police department's failure to produce the money the victim surrendered (I). Defendant also claims (II) the trial court abused its discretion when it denied his motion for a new trial, and (III) insufficient evidence supported the finding that he was the robber. Defendant further asserts the trial court (IV) abused its discretion by denying his motion to strike his 1998 robbery conviction and (V) failed to exercise its discretion in imposing the upper term. We reject these claims and affirm the judgment.

BACKGROUND

Just before 5:00 a.m. in August, Jorge Lopez was walking on his way to work when defendant and another man ran across the street toward him. They caught Lopez, yelled obscenities at him and kicked him. When Lopez fell to the sidewalk, the two men repeatedly punched him. His backpack flew into the street. Lopez unsuccessfully tried to run, but the two men caught him and resumed hitting and kicking him. He again fell, this time in the street. Defendant hit him with a closed fist. Lopez surrendered his wallet and money from his pocket totaling $11: a $5 bill and six $1 bills. He handed the wallet to defendant. Defendant demanded more money. When Lopez denied having any more money, the two men walked away. Lopez's chest and ribs hurt. He had scraped his arm and torn a thumb nail, causing "a lot of" bleeding.

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[1] Additional statutory references are to the Penal Code.

The prior serious felony conviction was a 1998 robbery conviction in Los Angeles Superior Court case No. BA160499. (§ 211.) The prison term findings were for a 1995 possession of a controlled substance in Los Angeles Superior Court case No. YA022733 and a 1989 transportation, sales, etc., of a controlled substance. (Health & Saf. Code, §§ 11350, subd. (a) and 11352.)

Los Angeles Police Officers Keith Tinsley and Joshua Kniss approached as defendant was crouched over Lopez. Lopez said he had been robbed by defendant. Defendant and his cohort walked away. When Tinsley called, "Stop, police," defendant ran. The officers followed. As they passed the other man, he said he had nothing to do with the incident. The officers did not stop him, but continued pursuit of defendant over a wall and through an alley, never losing sight of him. Defendant reached a locked gate and elbowed Tinsley in the chest. Defendant ran through the gate and confronted another locked gate. He turned and assumed a fighting stance. Kniss radioed for assistance. Tinsley used pepper spray on defendant and subdued him.

Having been admonished, Lopez identified defendant in a field identification. A search of defendant turned up a $5 bill and five $1 bills some of which bore fresh blood. The officers retraced the chase and found another bloodied $1 bill and Lopez's wallet. Tinsley returned the wallet to Lopez. The money and defendant's clothes were booked into evidence.

DISCUSSION

I

Defendant says the trial court abused its discretion in (1) not considering his motion for sanctions related to the "destruction" of the money Lopez gave up to defendant, (2) not holding a hearing on the issue and (3) denying defendant's new trial motion based on that ground in the face of defendant's newly-discovered evidence. We disagree.

Although defense counsel subpoenaed the money taken from Lopez, the police ultimately reported it had been placed in the general fund because it had not been marked for retention. This lapse was discovered at trial.

The issue relevant to the bloodied money was identification of defendant as the robber. Eyewitness accounts of the color of defendant's pants was inconsistent as to

whether his pants were dark or light. The clothes he was wearing were admitted into evidence. The pants were light colored.

Defendant claims a due process failure when the trial court did not hold a formal Evidence Code section 402 hearing as requested by defense counsel on discovering the money was not available. Defendant also faults the trial court for denying his new trial motion based on evidence discovered after trial had begun because defense counsel did not learn of the money's disappearance into the general fund until trial had begun. The "new evidence" was relevant portions of the Procedures Manual from the Los Angeles Police Department counsel was able to locate after trial. Had counsel known the money had been "destroyed," counsel would have subpoenaed people responsible for assuring police procedures were followed, made a pretrial motion to dismiss, made a *Pitchess* motion,[2] and persisted in defendant's right to a full evidentiary hearing on the issue. Counsel also would have asked for an instruction advising the jury it could view with distrust evidence offered when the party with the power to produce better evidence actually produced weaker and less satisfactory evidence. Further, asserts defendant, counsel could have requested an instruction similar to that given by the trial court in *Arizona v. Youngblood* (1988) 488 U.S. 51, 54 (if the jury found the police had destroyed or lost evidence, they might "'infer that the true fact is against the State's interest.'")

The light-colored pants defendant wore the morning of the robbery were admitted into evidence at trial. There was no evidence that the pants or any of its pockets bore traces of blood.

Defendant focuses on the absence of the money at trial. Yet the meaningful evidentiary factor was not the money, but the pants. The jury heard the officers' testimony of the bloodied state of some of the money when retrieved from defendant's pants, testimony that the money had been transferred into the general fund, and that the pants bore no traces of blood, a fact tending to exculpate defendant.

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2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Accordingly, defendant does not establish the necessity of the money at trial as a vehicle for creating reasonable doubt. We find no abuse of discretion or error in the trial court's conduct in connection with the issue of the money, including its denial of defendant's new trial motion based on claimed police procedural irregularities.

II

Defendant claims the trial court abused its discretion by denying his motion for a new trial. Defendant says the court improperly deferred to the jury's findings when it should have undertaken an independent evidentiary evaluation. He says the court denied the motion "without considering" its obligation. We conclude otherwise.

In the trial court, and on appeal, defendant correctly stated the applicable trial court standard is one of independent review. The trial court "is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' [Citation.] [¶] A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. '"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 524.)

Among the grounds defendant raised in his new trial motion was that the verdict was contrary to the law or evidence. In his moving papers, he argued the inconsistencies among the testimony of Officers Tinsley and Kniss and victim Lopez, as well as the placement of the bloody money into the general fund after it had been booked in evidence. Defendant also attacked the credibility of the two officers.

At the hearing on the motion, defendant focused on testimonial inconsistencies, arguing "[T]he most crucial things were the fact that the evidence against [defendant] . . . was contrary to anything -- no reasonable jury could have been sitting here and

listening to this testimony of Mr. Lopez, who was the witness to all of this, and then to the police officers who came in here and stated something that was so ridiculous, dark pants being white or white pants being dark, that kind of stuff. I think that's the most crucial thing."

The court noted that "[m]uch of [the factual matters defense counsel was] indicating were matters that came before the jury. The jury in the end knew about the shirt. The jury in the end knew about the pants. I bel[i]eve the jury in the end knew about the hair. And the jury in the end knew to a great extent about the money, in other words, what had been done, what hadn't been done."

The court later commented, "And as far as the facts are concerned, the jury viewed this matter from the prosecution's standpoint, after hearing the prosecution's presentation, and your . . . legal attack on those facts, again, these matters were all before the jury. [¶] It's not as if you didn't get your day in court. And that's what I would really be concerned about here. [¶] But these issues were matters that the jury had to make a determination on, and they found against [defendant], and I have to respect that."

The court ruled, "The court has heard extensive argument from [defense counsel]. The court has reviewed both of the written motions,[3] both the initial motion and the supplement, and has heard from the district attorney.

"Mr. Hooks, I want to make it plain to you, the court feels that the jury heard these issues, and they made their decision, and I don't bel[i]eve there is sufficient grounds for me to disturb that decision, so I have to deny your motion for a new trial, and that will be the court's order here."

Defendant points to the first two preceding quotes as evidence that the trial court did not undertake an independent review of the facts. He also faults the court for not specifically stating it was applying the independent review standard. The court's last quoted statement, however, convinces us it was well aware of the applicable standard and

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3 Defendant's initial new trial motion set out the independent review standard as the applicable standard for trial court review as to the sufficiency and credibility of the evidence.

its statement that it did not believe sufficient grounds existed for it to disturb the jury's decision indicates it had come to its own conclusion that sufficient evidence supported the guilty verdict.

"Although it would have been preferable for the court to have been more specific, stating it was denying the motion based on its independent weighing of the evidence, its failure to do so and its use of less than artful language cannot be equated with having applied the wrong standard." (*People v. Price* (1992) 4 Cal.App.4th 1272, 1276.)

III

Defendant contends there was insufficient solid, credible evidence that he was the person who robbed Lopez. We disagree.

Defendant focuses on conflicts and inconsistencies in the evidence concerning identification of him as the assailant. For example, he attacks Officers Tinsley and Kniss' credibility, asserting "no reasonable jury apprised of the facts would convict" him. He says Lopez's testimony was inherently unreliable with respect to his description of the robber, his clothing, and the location of the officers. He points to Lopez's testimony that the police told him they had caught the person who robbed him before he identified defendant as the robber, but ignores Lopez's testimony that the police had told him that man might or might not be the man who robbed him. He picks out Lopez's testimony that the police told him they had caught one of the men with his wallet, an act denied by Tinsley and Kniss. He says other factors increased the suggestiveness of Lopez's identification of him. At the field identification, Tinsley stood with defendant who was handcuffed; defendant was the only African-American male presented to Lopez. They were in an alley in the early morning and Lopez was in a police car approximately 15 to 20 feet from defendant.

Defendant says Lopez later admitted he could not tell one of the suspects from the other and said defendant was the one who took his wallet because officers told him defendant had his wallet, something Tinsley and Kniss denied.

Defendant also contends the identifications by Officers Tinsley and Kniss were not credible because Lopez said he was lying on the ground in the street and the two assailants were in front of him and both "had" him lying on the ground and did not state one of the men was crouched over him. Tinsley and Kniss testified defendant was crouched over Lopez, who was lying in the street and the other man was several feet away from Lopez.

Defendant also mentions the discrepancy in the testimony of Tinsley and Kniss concerning the actual color of defendant's pants (light tan or dirty white) versus Tinsley's first perception of the pants (dark or black). Defendant cites Lopez's testimony that the suspect was wearing a white shirt with black horizontal stripes. Both officers testified they had not lost visual contact with defendant as he ran. Defendant says it is impossible to reconcile the varying clothing descriptions with what he was wearing when arrested. Defendant was dressed in light tan pants and a shirt variously described as black or white with horizontal stripes in the contrasting color, and a black shirt with white stripes near the collar.

Defendant also points to the inconsistent testimony as to how much money Lopez surrendered and the fact that the wallet was not found on defendant and Tinsley did not see him with the wallet or dropping the wallet. He says the officers' testimony cannot be used to corroborate Lopez or be considered solid and credible with respect to events immediately surrounding the robbery because their testimony was inconsistent with each other's testimony and with Lopez's testimony as to who was where and when things happened. Defendant argues the officers' testimony that some of the money had blood on it is incredible because no traces were found on his pants and Lopez gave up the money and wallet with his right hand when his left thumb was bleeding.

"In reviewing the sufficiency of the evidence, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] . . . [We] must review the whole record in the light most favorable to the

judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We '"presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Davis*, *supra*, 10 Cal.4th at p. 509.)

Defendant's challenge to the evidence is an invitation for us to do what we must not: reweigh the evidence and reevaluate witness credibility. The jury worked its way through the evidence and was entitled to conclude defendant was guilty. Lopez, having been duly admonished, identified defendant at the field identification as the person who took his money and his wallet. He also identified defendant at the preliminary hearing and at trial. Officers Tinsley and Kniss first saw defendant right after the beating and robbery and chased him as he fled, never losing sight of him. Ten dollars, some of which was bloody, was found in defendant's pocket; another blood-stained dollar bill and Lopez's wallet were found along the route by which defendant fled.

Conflicting evidence and justifiably suspicious testimony do not justify reversal because it is the trier-of-fact's function to separate factual truth or falsity. (*People v. Lewis* (2001) 26 Cal.4th 334, 361.)

IV

We reject defendant's claim that the trial court abused its discretion in denying his motion to strike his 1998 robbery conviction under section 1385 and *Boykin v. Alabama* (1969) 395 U.S. 238, 243, and *In re Tahl* (1969) 1 Cal.3d 122, 132.

Boykin/Tahl. After his conviction in this case, defendant filed a motion to strike the 1998 robbery conviction. At the sentencing hearing, defense counsel argued that, based on the transcript from the 1998 plea agreement, defendant had not knowingly, intelligently, and voluntarily waived his constitutional rights. Counsel contended defendant had not understood what was occurring at the plea hearing based on his confusion over the sentence he was facing and his comment that God had told him that if he had done nothing wrong, he should not take the deal (apparently a reference to a

statement made by defendant at one of his *Marsden* hearings in that case).[4] Therefore, defendant wanted a trial in Los Angeles Superior Court case No. BA156251, which had been dismissed and then refiled because a witness who had filed a declaration asserting defendant's innocence of robbery could no longer be found. When refiled, the matter bore case No. BA160499, the strike prior found true in this case.

At the hearing on defendant's motion, the trial court in this case reviewed the March 3, 1998, plea hearing reporter's transcript on the record. Before that review, the court addressed defendant. "Mr. Hooks, I can not at this time go back and try the facts underlying BA 160499, nor can I pass judgment on whether you made a good deal, a bad deal, or an opinion necessarily on a particular deal in this case; further, whether anything better was offered to you previously, then withdrawn, something reoffered. [¶] The only thing I have before me here on the Boykin-Tahl issue is whether, as [defense counsel] set out, you knowingly, intelligently, and voluntarily gave up your rights and entered your plea accordingly."

The 1998 transcript showed the court explained the People's offer as "still" being three years in state prison concurrent with any time he might do on "the probation violation." Defendant's custody credits were calculated. Defendant asked when he would be released, and, at the court's suggestion, conferred with counsel. Counsel asked if the plea could be no contest. The court said it could be under *People v. West* (1970) 3 Cal.3d 595, "because he feels it is in his best interests to do so. . . ." When the court directed the prosecutor to take the plea, defendant asked, "Will this be . . . a strike against me? It's under $500." The court responded that a robbery is a strike, "[b]ut it doesn't [a]ffect you in the sense that you have to do 80 percent, unless you pick up something else in the future." Defendant replied, "No, I won't." The court explained defendant was eligible for half-time credits now and reiterated that he would be looking at 80 percent if

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4 *People v. Marsden* (1970) 2 Cal.3d 118.

he picked up something in the future. Defendant said, "I didn't want to waste your time and [my former counsel]'s time. I will take the time right here."

The prosecutor took the plea. He explained the charges. Asked if he understood the charge, defendant said, "I understand everything, sir." Defendant confirmed the prosecutor's description of the plea agreement and that no other promise had been made to influence him to plead. The prosecutor asked if defendant was "pleading freely and voluntarily and because you bel[i]eve it is in your best interests to do so[.]" Defendant replied, "Freely, because I got the understanding." The prosecutor said he needed a "Yes" or "No" and said defendant could speak with counsel if he wished. The court said, "In other words, is anybody saying, 'You better do this, or else'?" Defendant answered, "No." The prosecutor asked, "Are you pleading freely and voluntarily because you bel[i]eve it is in your best interests?" Defendant answered, "Freely." The court noted, "And he is nodding yes."

The prosecutor advised defendant of the maximum term of five years and defendant confirmed he understood, saying, "That's without any of the priors?" The prosecutor responded "Yes," and advised defendant that on his release from prison he would be on parole. Defendant said he understood the balance of the advisements and waived his trial-related constitutional rights. Defendant pled no contest, and the trial court found he had freely and voluntarily pled, there was a factual basis for the plea, and that defendant was guilty.

The trial court in this case found that on the basis of the transcript defendant was advised of his constitutional rights and the consequences of his plea and knowingly, voluntarily and intelligently waived his rights and accepted the 1998 disposition. The court also noted it had looked at other materials submitted by defendant in support of his motion, and found the 1998 conviction valid.

Section 1385. Defense counsel said she still thought the court could strike the 1998 conviction pursuant to section 1385. In ruling on a motion to dismiss a strike, "the court in question must consider whether, in light of the nature and circumstances of his

present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Defense counsel contended there was insufficient evidence to support the 1998 robbery conviction had defendant gone to trial. On the day set for trial, the complaining witness did not timely appear, but apparently arrived two hours late. The exonerating witness "was nowhere to be found." The court issued a bench warrant. Counsel in that case instructed his investigator to find the witness because "'without him, Mr. Hooks would probably be convicted.'" This prediction of a likely conviction absent the testimony of the exonerating witness, who had apparently quit his job, moved, and changed his phone number, was the basis for defense counsel's argument in this case. The defense also apparently repeatedly tried without success to locate and interview the complaining witness.

The court acknowledged that one of the things a trial court should consider on a section 1385 motion was the underlying facts of the prior strike conviction. Referring to *People v. Williams*, *supra*, the court added it should consider the facts of the current case, the time between convictions, the type of life the defendant has led, and his prospects.

Defense counsel pointed out no gun had been seen in the incident resulting in defendant's 1998 conviction, but acknowledged one witness said she saw him put his hand "in his chest," and another said he put his hand in his waistband. Counsel also referred to former defense counsel's notes, including statements that he had found inconsistencies in the victim's statements and believed she was lying, but needed the exonerating witness to establish her lies. Counsel added that most of defendant's problems with the law were drug-related and without violence until the 1998 case.

The prosecutor pointed out that defendant had six prior felony convictions resulting in four separate prison terms. Defendant had been on parole for 11 days when

he committed the current offense for which a jury convicted him. According to the probation report, defendant's adult criminal history began March 1, 1985. "He's either been convicted of a crime or been in custody every single year since that first conviction." The prosecutor added that defendant had "failed miserably on probation or parole" and was on parole for robbery when he committed this robbery. Defendant's pre-conviction probation report details defendant's history.[5] The prosecutor argued the facts of this case (beating Lopez and pushing Officer Tinsley) were serious. Defense counsel again argued the inconsistencies and contradictory evidence of the current case.

Defendant says the court failed to give "proper consideration" to the pertinent factors and "relied instead on its own policy of only striking a prior in certain type[s] of cases." Thus, he says, the court's analysis was not the individualized consideration *Williams* requires. We read the court's words quite differently.

Addressing defendant, the court announced its ruling. It began by explaining that "usually" the court was "inclined" to strike a qualifying prior in cases where the current conviction was possession of small amounts of a controlled substance or petty thefts with a prior. The court mentioned cases "where the felony is indeed low grade, non-serious, [and] non-violent . . . . [¶] In this particular case, I realize now how the prior is characterized, but the current offense is, again, a robbery situation and, further, there has been no evidence whatsoever as to any prospects and how, if the court was to grant leniency, how this would be a benefit to society, well, I will just say, to society, once you gain your freedom. [¶] Further, your record prior to . . . the original strike, and your conduct since the strike prior and then on this conviction has been such that the court can't say you have led a blameless and law-abiding life. [¶] And so on that basis, the

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5 The probation report showed prior convictions for: (1) a 1985 possession of a controlled substance; (2) a 1985 auto tampering; (3) a 1986 loitering; (4) a 1987 being under the influence of a controlled substance; (5) a 1988 battery, providing false identification to a peace officer, and petty theft with priors; (6) a 1989 resisting arrest; (7) a 1989 burglary; (8) 1989 sales of a controlled substance; (9) a 1992 assault with a firearm on a peace officer; (10) a 1995 possession of a controlled substance; and (11) the 1998 robbery.

court has to deny your motion pursuant to 1385." As noted, at sentencing the court struck the two section 667.5, subdivision (b) enhancements.

We find no abuse of discretion in the court's denial of defendant's motion to strike the 1998 robbery conviction.

V

Defendant says the trial court abused its discretion by imposing the five-year upper term because it did not understand it retained discretion to impose the middle term under the circumstances. We conclude otherwise.

The prosecutor had informed the court he was seeking the high term and the five-year enhancement under section 667, subdivision (a). Defendant addressed the court, denying he had robbed Lopez or committed the 1998 robbery. He admitted prior drug problems, but said he was now drug-free and had two daughters. The court noted that, in addition to the evidence at trial, the jury's verdict, and its own finding on the qualifying prior, it had heard the positions expressed by both lawyers on the new trial motion and the motion to strike under *Boykin/Tahl* and section 1385.

The court explained the sentencing range and that it was required to look at and weigh mitigating and aggravating circumstances to determine the appropriate term. The court found, "Your prior performance on . . . probation, but primarily on parole, has been bad or not up to standard. [¶] You were on parole at the time the crime was committed. [¶] You have served prior prison terms. [¶] And your prior record of crimes were numerous and of increasing seriousness. [¶] The court, further, in looking over the various factors here, those are factors that we call in aggravation. Your factors in mitigation, I don't find any to be present." The court found the aggravating factors outweighed the mitigating factors and "I must impose, therefore, the high term."

We conclude the court's statement that it "must" impose the high term, taken in the context of the lawyers' arguments and the court's relevant comments, was no more

than a statement that on the record before it, including the fact that the aggravating factors far outweighed the mitigating factors, the court concluded the circumstances warranted imposition of the high term and exercised its discretion to impose the high term.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MALLANO, J.